Supreme Court, U.S.
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In The

Supreme Court of the United States

KATHERINE CRASE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fifth Amendment Due Process Clause limit the power of undercover federal agents to create crimes for the purpose of prosecuting otherwise innocent persons?

2. If so, is it a deprivation of due process for an undercover agent to target a person whom he has no reason to believe has committed a crime, devise a scheme in which to ensnare her, pressure her to participate, and insist that she go through with the scheme even when she tells him that she has decided to withdraw?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were Petitioner Katherine Crase, Respondent United States, and appellants Violette Gail Eldridge and Paul D. Kuhn.

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PETITION FOR A WRIT OF CERTIORARI

Katherine Crase petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-14) is unreported. The court of appeals' order denying Ms. Crase's petition for rehearing (App. 17) is unreported. The district court's order (App. 15-16) is unreported.

JURISDICTION

The court of appeals entered judgment on April 21, 2010. App. 1. The court denied a timely petition for rehearing on June 16, 2010. App. 17. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The government manufactured this case. It targeted petitioner Katherine Crase, a lawyer with an unblemished record. An undercover FBI agent undertook a nine-month campaign to get Ms. Crase and one of her clients to commit a crime. When that effort failed, the agent developed a second ruse. The agent--posing as a hedge fund manager, complete with NASD credentials--pressed Ms. Crase to help him obtain money from an investor (played by a second undercover FBI agent). When Ms. Crase appeared to lose interest in the plan, the agent hounded her until she responded. Each time she pulled back, the agent redoubled his efforts, barraging her with telephone calls.

In the end, Ms. Crase refused to go through with the plan. When the purported hedge fund manager told her that he had $100,000 from the purported investor and was ready to wire it to Ms. Crase's company, she instructed him to return the money to the investor. Even then the undercover agent pressured her to complete the transaction. But she resisted; she sent back the investor's subscription agreement unexecuted and rebuffed the agent's efforts to involve her in a further scheme.

Three years later, the government indicted Ms. Crase for mail fraud, convinced a jury to convict her, and obtained a thirty-month prison sentence, which she is now serving. A panel of the Eleventh Circuit found that these facts did not give rise to a due process violation and affirmed Ms. Crase's conviction. App. 6-8.

This case squarely presents a fundamental question left open in *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 425 U.S. 484 (1976): whether the Fifth Amendment Due Process Clause imposes limits on government involvement in manufacturing crime for the purpose of prosecuting otherwise innocent persons. That question has produced a deep and entrenched circuit split. Four circuits--the Second, Sixth, Seventh, and District of Columbia Circuits--hold that due process imposes no such limits. The remaining circuits purport to recognize limits on government crime creation but have set the bar so high that, in the thirty-four years since *Hampton*, only two reported court of appeals decisions have found dismissal appropriate on this basis. The due process limits on government crime creation should either be given real meaning, to protect the liberty of innocent persons whom overzealous agents target, or formally abandoned.

I. PROCEEDINGS BELOW.

The government indicted Ms. Crase and her co-defendants, Violette Gail Eldridge and Paul D. Kuhn, on August 29, 2007. The indictment charged Ms. Crase with conspiracy to commit mail fraud and six counts of mail fraud.

Ms. Crase moved before trial to dismiss the indictment for outrageous government conduct. Doc. 91.[1] The district court denied the motion without

[1] Pleadings are cited by the district court docket number. Transcripts are cited by date or volume and page. Government and defense exhibits are cited as "GX" and "DX," respectively.

explanation. App. 15. The jury found Ms. Crase guilty on all counts. The district court sentenced her to 30 months incarceration. On April 21, 2010, a panel of the Eleventh Circuit affirmed, rejecting Ms. Crase's contention that the government's conduct in creating the alleged offenses violated her right to due process. App. 1, 6-7. The court of appeals denied a timely petition for rehearing en banc on June 16, 2010. App. 17.

II. STATEMENT OF FACTS.

Katherine Crase was an attorney in Tampa, Florida with a solo civil practice. Her problems began when she represented Violette Eldridge in a civil fraud action brought against her by the SEC in federal court in Indiana. Ms. Crase obtained dismissal of the Indiana suit on venue grounds. Doc. 115 at 4 n.3; 2 T. 340-41. She continued to represent Ms. Eldridge when the SEC refiled the suit in federal court in Atlanta. 2 T. 329-32.

A. The Beginning of the Sting Investigation.

In May 2003, while the SEC action against Ms. Eldridge was pending, FBI agent John Osa began an undercover investigation of Ms. Crase and Ms. Eldridge. 2 T. 346, 349. The FBI had no reason to suspect Ms. Crase of wrongdoing when it began

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(continued...)

The Excerpts of Record from the court of appeals are cited as "ER."

investigating her.[2] Agent Osa posed as a hedge fund manager named "John Firo." To make the deceit convincing, Firo obtained credentials on the NASD "Broker Check," and the FBI created a website for his purported fund, Talon Holdings. 2 T. 348; 3 T. 491-94. The NASD website showed that Firo was an accredited broker with no disciplinary problems. 3 T. 492. The Talon Holdings website represented that Firo was Executive Vice President and had a Bachelor's of Business Administration degree in international finance. 3 T. 493. Using these false credentials, Firo spent nine months trying to convince Ms. Crase and Ms. Eldridge to place money in Talon Holdings or to find other investors for the fund. They never did so. 2 T. 350, 500, 507.

In early 2004, having produced no evidence of criminal conduct despite months of investigation, Firo tried another tactic. At a meeting in February 2004, he told Ms. Crase that he had an investor--later identified as "Grant Colvin," played by undercover FBI agent Vince Pankoke--with $750,000 to invest. Firo proposed that Colvin invest his money through Ms. Crase and Ms. Eldridge. When Ms. Crase did not pursue Firo's proposal, he telephoned her repeatedly until she responded. 3 T. 512-16. This pattern repeated itself over the following months; between February 2004 and July

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[2] The prosecutor's pretrial account of how Agent Osa's investigation began in 2003 said nothing about any suspected wrongdoing by Ms. Crase. According to the prosecutor, a "cooperating witness" introduced Ms. Eldridge to Agent Osa (in his undercover role as Firo) because "around the end of 2002, beginning of 2003, [the cooperating witness] began to believe that [Ms. Eldridge] may be involved in fraudulent activities." T. 7/9/08 at 6.

2004, when the ruse ended, the FBI agents repeatedly pressed Ms. Crase to go forward with the proposed investment, calling her over and over until she returned their calls. *E.g.*, 3 T. 569 ("Q "It's fair to say you called over, and over, and over? A I made numerous phone calls to Ms. Crase and Ms. Eldridge, yes."). To get Ms. Crase to respond, Firo would at times ask Ms. Eldridge to have Ms. Crase call him. *E.g.*, 3 T. 512-13, 537-38. Agent Osa conceded that he made the "vast majority of the calls in this case" and that Ms. Crase "did not call [him] back in connection with the vast majority of his messages." 3 T. 548.

B. Firo Requests Payment.

At a secretly recorded meeting on March 15, 2004, Firo again brought up the purported investor, and Ms. Crase and Ms. Eldridge discussed various investment vehicles to accomplish his goals. Firo indicated at the March 15 meeting that he wanted to receive a payment equal to 30% of the amount invested, without disclosing the payment to the investor. Ms. Crase and Ms. Eldridge objected that an up-front payment to Firo would make it difficult to return the investor's money with a profit in five years and would also present a problem if the investor decided to terminate the investment and demand his money back. 2 T. 375-80; 3 T. 623-25; GX 11B at 11. Ms. Crase suggested splitting "the fees and the earnings that we'll do off this," rather than giving Firo a portion of the investor's principal. *Id.* Firo resisted this suggestion, and the matter was left unresolved. *Id.* at 11-13.

In a March 24 conversation, Ms. Crase proposed that rather than paying Firo a commission, she could invest a portion of Colvin's money in Firo's hedge fund--a fact of which Colvin would become aware, because Ms. Crase offered him access to the books so he could track his investments. 2 T. 456-59; 3 T. 539-43, 622; *see* GX 20A at 24 (Ms. Crase tells Colvin: "We sit down face to face and I have no problem just throwing open the books."). As Ms. Crase put it to Firo, "If we have the option of paying a commission or making an investment, and we're representing to [Colvin] that we're not paying commissions, then we better make an investment." 3 T. 542; *see* GX 14A at 5.

In a further discussion on April 12, with the matter still unresolved, Ms. Crase suggested paying Firo as a broker "and we disclose that up front to the, to the investor" or, alternatively, "hav[ing] you on the company." GX 17A at 4. She explained that because of the scrutiny Ms. Eldridge's SEC problems had attracted, "I want to do it the squeakiest, cleanest most up front way. Because if there's anything even hinting at gray with the, with the microscope she's under right now it can bite all of us." *Id.* at 4. Ms. Crase told Firo: "Paying the commission straight up front is easy but then we have to be able to disclose it." When Firo responded, "Right and I don't know," Ms. Crase added: "And I don't have a problem sitting down with this guy saying look John has not asked for a commission because you haven't. But we built a structure in like this and we will be paying John a commission." Firo immediately protested, "Well Kit hey . . . ." Ms. Crase asked, "Is that a deal breaker?" Firo

responded, "Yeah," and tried to steer Ms. Crase back toward agreeing to an up-front, undisclosed payment to Firo out of Colvin's principal. *Id.* at 5.

On April 26, with the matter still under discussion, Firo rejected the idea that, in lieu of a commission, Ms. Crase would invest a portion of Colvin's money in his hedge fund. Firo proposed instead that the money be paid under an independent consulting agreement. 3 T. 614-26. Ms. Crase noted that such an agreement would create a conflict of interest, and she and Firo decided to seek a conflict waiver from Colvin. 4 T. 647, 659-62. As Agent Osa acknowledged at trial, the waiver arose from the need to disclose to Colvin any payment to Firo:

> Q Okay. So you can receive a commission from two different people if it's disclosed to the investor?
>
> A Yes.
>
> Q Okay. And a disclosure would be something like a waiver of conflict of interest?
>
> A That's what Ms. Crase was getting at when she sent me over that waiver, yes.
>
> Q Okay. Wanting to disclose it to Mr. Colvin?
>
> A Yes.

3 T. 494.

On May 7, Colvin executed a waiver of all conflicts of interest arising from Firo's work with Ms. Crase's investment company, Precision Explorations, Inc. GX 7; 3 T. 494-95. As late as May 26, however, Ms. Crase and Firo still had not agreed on how Firo would receive the money he requested. 4 T. 711-13.

C. Colvin Receives the LOM.

On April 14, at Firo's urging, Ms. Crase had her sole meeting with Colvin. She enlisted her friend and business associate, Paul Kuhn, to attend and pitch the investment opportunity. The meeting--which Firo attended as well--was held in the office of Florida State Representative Murman, for whom Mr. Kuhn's wife worked. At the meeting, Mr. Kuhn touted his connections with Representative Murman and with other politicians and the access those connections gave him to potentially valuable information.[3] Although Murman's testimony suggested that Mr. Kuhn exaggerated the benefits of his association with her, 5 T. 869-77, Murman conceded that he had a close relationship with her and other Florida politicians, 5 T. 914-52.

During the April 14 meeting, Ms. Crase presented Colvin with the Limited Offering Memorandum she had prepared for Precision

[3] At a preparation meeting the day before the meeting with Colvin, Firo encouraged Ms. Crase and Mr. Kuhn to let Colvin know "that we have political clout." GX 18B at 48; *see* 3 T. 583-86. Firo also resisted Mr. Kuhn's suggestion that the meeting with Colvin be held at a hotel rather than at Murman's office. 3 T. 581-82, 586-87.

Explorations' offer of unsecured debentures. 3 T. 428-36; 5 T. 1045. The LOM--GX 1--contains extensive, repeated disclosures of the risks of the potential investment. Among other warnings, the LOM declares that "[n]o market exists for the sale of the Unsecured Debentures and none is anticipated to develop," GX 1 at 1; that "AN INVESTMENT IN THE UNSECURED DEBENTURES IS SPECULATIVE AND INVOLVES RISK FACTORS," *id.*; that "IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED," *id.* at 2; that "THIS OFFERING INVOLVES CONFLICTS OF INTEREST AND THE PAYMENT OF CERTAIN FEES TO THE CORPORATION OFFICERS AND THEIR AFFILIATES," *id.* at 4; that "[p]ersons or entities contemplating investment with the Corporation should give careful consideration to the risks involved in such an investment, including those summarized below," *id.* at 5; that "[t]here can be no assurance that the Corporation will sell all of the Unsecured Debentures offered hereby. . . . To the extent that substantially less than all of the Unsecured Debentures offered hereby are sold, the ability of the Corporation to achieve its objective could be adversely affected," *id.* at 6; that "[i]nvestment in the Unsecured Debentures is suitable only for investors who are financially able to commit to an illiquid or long term investment," *id.*; that "[t]here is no relationship between the offering price of the Unsecured Debentures and the Corporation's assets, earnings, book value or any

other objective criteria of value," *id.* at 7; and that "[t]he Corporation is relatively new and has little history of operations on which an investor can base an evaluation of the Corporation. The Corporation has limited net worth," *id.* at 9.

Significantly, given the emphasis the government placed at trial on oral representations that Mr. Kuhn and Ms. Crase made to Colvin at the April 14 meeting, the LOM admonishes potential investors that "[a]ny oral or written information provided by any party, including representatives of Precision Explorations, Inc., other than in the form of an amendment to this Memorandum, is not in any way to be considered a part of this Limited Offering Memorandum. Reliance should be placed only upon the contents of this Memorandum when considering an investment in the Unsecured Debentures offered herein." *Id.* at ii. In case potential investors missed the significance of this caution, the LOM adds that "[n]o one has been authorized to give any information or to make any representation with respect to the Corporation or the Unsecured Debentures which is not contained in this Memorandum or furnished by the Corporation at the request of a prospective investor. If given, made or used, any other information, representation or offering literature must not be considered as part of this Limited Offering Memorandum." *Id.* at 4. And again: "No person has been authorized to give any information or to make any representations with respect to the Unsecured Debentures other than as set out in this Limited Offering Memorandum, and, if given or made, such information or representations should not be relied upon by a

prospective investor in deciding whether to invest in the Unsecured Debentures." *Id.* at 12.

Agent Osa acknowledged at trial that, in light of this language, "[the LOM] is the entire agreement between the parties, if such an agreement is going to exist." 4 T. 747. He conceded that, according to the LOM, "anything that somebody says that's not contained in this document is irrelevant, don't rely on it." 4 T. 750; *see id.* at 751 ("Q. So at least three times in this document here, this memorandum, it's telling you, do not rely on any oral representations that may have been made, correct? A. That's correct.").

Perhaps because the disclosures in the LOM could destroy the criminal case he was trying to construct, Agent Osa (in his role as Firo) repeatedly suggested to Ms. Crase that she keep the LOM "simple." *See, e.g.*, GX 12A at 3; GX 14A at 4. On March 19, 2004, for example, Firo urged Ms. Crase to "keep it [the LOM] fairly simplified in the fact that I don't want this guy to say okay well let me have uh a team of lawyers to look this over and, and this and that." GX 12A at 3. Despite Firo's request, the LOM Ms. Crase presented to Colvin contained extensive disclosures concerning the risks of the investment--as outlined above--and recommended that "EACH PROSPECTIVE INVESTOR SHOULD CONSULT PROFESSIONAL ADVISORS THAT ARE INDEPENDENT OF PRECISION EXPLORATIONS, INC., AS TO THE ECONOMIC, LEGAL, TAX AND OTHER ASPECTS" of the investment. GX 1 at 4; *see id.* at 8 ("Prior to purchasing, each prospective investor is urged to consult with their

attorney and their personal business and tax advisors to determine the legal, tax, and business ramifications of purchasing Unsecured Debentures.").

On April 26, 2004, Colvin signed a subscription agreement that reflected his understanding and acceptance of the terms of the LOM and his agreement to invest. GX 5. In that agreement, he certified (among other things) that he had read and understood the LOM; that he was a person of substantial means; that he was "capable of evaluating the merits and risks of the prospective investment" and, in general, sophisticated in financial matters; and that he understood that "the Unsecured Debentures is a speculative investment that involves a high degree of risk of loss of the entire investment of the undersigned in the Corporation." GX 5; *see, e.g.*, 3 T. 487-91. Colvin further warranted that he had

> relied solely upon the [LOM], the documents and materials submitted therewith, and independent investigations made by the undersigned or his Purchaser Representatives, in making the decision to purchase the Unsecured Debentures, and acknowledges that no representations or agreements other than those set forth in the Memorandum have been made to the undersigned in respect thereto.

GX 5 at A-3; *see, e.g.*, 5 T. 1016-19. As Agent Pankoke testified at trial:

> Q. Okay. So you're representing [in the subscription agreement] that you're a wealthy individual?
>
> A. Yes.
>
> Q. Who has sufficient knowledge to understand these investments, risks, merits, everything else?
>
> A. Yes.
>
> Q. You're also representing that you have relied solely, solely on the limiting offering memorandum?
>
> A. Yes.

5 T. 1018.

D. Ms. Crase Walks Away.

Despite constant badgering from Firo following the April 14 meeting, Ms. Crase decided to abandon the proposed transaction. When Firo told her on May 21, 2004 that he was ready to send her $100,000 of Colvin's money in accordance with the April 26 subscription agreement, she directed him to return it. Agent Osa testified:

> Q. Okay. And during this conversation on May 21st, you advised Ms. Crase that you had some of Grant's money ready to send?
>
> A. Yes, I did advise that.

> Q. And she advised you to return it to him.
>
> A. That's correct.
>
> Q. Return the whole amount to him?
>
> A. That's correct.

4 T. 681-82. Despite Ms. Crase's directive to return Colvin's money, Firo tried to "keep the Grant deal on track." 4 T. 682. Agent Osa testified:

> Q. So the deal, this whole deal, is dying on the vine, and you're trying to keep it alive?
>
> A. That's correct.
>
> Q. . . . So in an effort to try to keep it alive you kept calling, correct?
>
> A. That's correct.
>
> . . . .
>
> Q. You continued to call?
>
> A. Yes, that's correct.

4 T. 685. Firo became "upset" in a May 25 conversation with Ms. Crase because the deal was not done. 4 T. 685-87. He called her repeatedly in late May to try to convince her to go through with the Colvin transaction. *E.g.*, 4 T. 687-91, 694-97, 701-09, 713-15; DX 1. But Firo's efforts to pressure

Ms. Crase failed. On June 1, she returned Colvin's subscription agreement unexecuted. GX 10, 10A; 5 T. 1046, 1053. When Firo contacted her in July 2004 about another potential investor with millions of dollars to invest, Ms. Crase told Firo that his broker fee would have to be disclosed up front and made no effort to pursue the investment. 4 T. 721-23. She "blew [Firo] off twice" when he tried to meet with her about the wealthy potential investor. 4 T. 723, 731-32.

In August 2007, more than three years after Ms. Crase's last interaction with Firo and Colvin, the government obtained an indictment against her for mail fraud.

REASONS FOR GRANTING THE WRIT

This case squarely presents an important question that has produced a deep and enduring circuit split: Does the Due Process Clause impose limits on crime creation by federal undercover agents for the purpose of prosecuting otherwise innocent persons--and, if so, what are those limits? This case, with its egregious and largely undisputed facts, offers the perfect vehicle for resolving that question.

I. THE CIRCUITS ARE DEEPLY SPLIT OVER WHETHER THE DUE PROCESS CLAUSE LIMITS THE POWER OF FEDERAL AGENTS TO CREATE CRIMES FOR THE PURPOSE OF PROSECUTING OTHERWISE INNOCENT PERSONS.

A. *Russell* and *Hampton*.

The principle that the Fifth Amendment Due Process Clause places limits on crime creation by federal agents has its modern roots in two decisions from this Court. In *United States v. Russell*, 411 U.S. 423 (1973), the respondent had been convicted of manufacturing methamphetamine. On appeal he asserted a due process violation because undercover federal agents had supplied an essential ingredient of the drug. The lower courts agreed.

This Court reversed in a 5-4 decision. It refused to adopt a "fixed rule[]," as a matter of due process, that prosecution is barred "when it is shown that the criminal conduct would not have been possible had not an undercover agent supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels." *Id.* at 431 (quotation omitted). The Court added: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952), the instant case is

distinctly not of that breed." *Id.* at 431-32. The Court added that "[t]he law enforcement conduct here stops far short of violating that fundamental fairness, shocking to the universal sense of fairness, mandated by the Due Process Clause of the Fifth Amendment." *Id.* at 432 (quotation omitted). Justice Douglas (joined by Justice Brennan) and Justice Stewart (joined by Justices Brennan and Marshall) dissented.

The Court next confronted the due process limits on government crime creation in *Hampton v. United States*, 425 U.S. 484 (1976). In *Hampton*, the petitioner had sold heroin to DEA agents that allegedly had been supplied to him by an informant, who also facilitated the sales. *See id.* at 486-87. Invoking the suggestion in *Russell* that law enforcement conduct might be sufficiently outrageous to bar prosecution, the petitioner contended that due process required dismissal of the charges against him.

This Court disagreed, but without a majority opinion. Justice Rehnquist, in an opinion joined by Chief Justice Burger and Justice White, concluded that "the remedy of the criminal defendant with respect to the acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment." *Id.* at 490 (Rehnquist, J.) (plurality opinion).[4] The plurality added that "[t]he limitations of the Due Process Clause come into play only when the Government activity in question violates some protected right of

[4] Ms. Crase did not request an entrapment instruction in this case.

the defendant." *Id.* (emphasis in original). The plurality concluded that "[t]he police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights." *Id.* at 490-91.

Justice Powell, in a concurrence joined by Justice Blackmun, took a less absolute stance. Justice Powell concurred in the judgment and in "much of the plurality opinion directed specifically to Hampton's contention." *Id.* at 491 (Powell, J., concurring in part). But the concurrence declined to join the plurality opinion to the extent it went beyond what was necessary to decide the case. The concurrence observed that the Court had not yet "consider[ed] whether overinvolvement of Government agents in contraband offenses could ever reach such proportions as to bar conviction of a predisposed defendant as a matter of due process." *Id.* at 493. Nor, the concurrence noted, had the Court "confront[ed] Government overinvolvement in areas outside the realm of contraband offenses." *Id.* Justice Powell thus declared himself "unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition," and thus preclude an entrapment defense. *Id.* at 495.

In dissent, Justice Brennan, joined by Justices Marshall and Stewart, would have reversed the conviction. 425 U.S. at 496-500 (Brennan, J.,

dissenting).[5] The dissent would have held that "conviction is barred as a matter of law where the subject of the criminal charge is the sale of contraband provided to the defendant by a Government agent." *Id.* at 500. The dissent would have adopted this rule under the Court's supervisory power "[f]or present purposes" and left for another case whether to do so as a matter of due process. *Id.* at 500 n.4. Thus, five Members of the Court--Justices Powell, Blackmun, Brennan, Marshall, and Stewart--left open the possibility that the Fifth Amendment Due Process Clause imposes limits on government crime creation.

B. The Circuit Split Since *Hampton*.

In the thirty-four years since *Hampton*, this Court has not addressed whether due process imposes limits on the power of a federal undercover agent to create a crime for the purpose of prosecuting an otherwise innocent person--or, if so, the contours of those limits.

The courts of appeals have split on the question. The Seventh Circuit rejects the so-called "outrageous government conduct" defense in any form. *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) (the defense of outrageous government conduct "does not exist in this circuit"). The Sixth Circuit rejects any "due process defense sounding in inducement." *United States v. Warwick*, 167 F.3d 965, 974-75 (6th Cir. 1999). The D.C. and Second Circuits limit the defense to "conduct involving

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[5] Justice Stevens did not participate in *Hampton*.

coercion, violence, or brutality to the person." *United States v. Gaviria*, 116 F.3d 1498, 1534 (D.C. Cir. 1997) (quotation omitted); *see United States v. Jackson*, 345 F.3d 59, 67 (2d Cir. 2003). The remaining circuits hold that the Due Process Clause limits government crime creation for the purpose of prosecuting otherwise innocent persons. As discussed below, however, those limits are largely undefined.[6]

C. The Courts of Appeals' Failure to Give Meaning to the Due Process Limits on Government Crime Creation.

The circuits that recognize due process constraints on government crime creation have failed to give meaningful content to those limits. In the words of the First Circuit, the so-called "due process defense," although alive in theory, is "moribund in practice" and rejected by the courts of appeals "with almost monotonous regularity." *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993); *see, e.g., United States v. Lakhani*, 480 F.3d 171, 181 (3d Cir. 2007) (due process limits on government crime creation "hanging by a thread") (quotation omitted).

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[6] *See, e.g., United States v. Williams*, 547 F.3d 1187, 1199-1201 (9th Cir. 2008); *United States v. Lakhani*, 480 F.3d 171, 177-78, 180-83 (3d Cir. 2007); *United States v. Garcia*, 411 F.3d 1173, 1181 (10th Cir. 2005); *United States v. Hunt*, 171 F.3d 1192, 1195 (8th Cir. 1999); *United States v. Sanchez*, 138 F.3d 1410, 1413 (11th Cir. 1998); *United States v. Asibor*, 109 F.3d 1023, 1039-40 (5th Cir. 1997); *United States v. Jones*, 18 F.3d 1145, 1154 (4th Cir. 1994); *United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993).

In the decade following *Hampton* the courts of appeals appeared ready to adopt a robust, flexible due process doctrine that curbed government involvement in manufacturing crime while preserving legitimate undercover investigative techniques. In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), for example, the court found that "the nature and extent of police involvement in the crime was so overreaching as to bar prosecution of the defendants as a matter of due process." *Id.* at 377. The court found significant not only that the government supplied the necessary ingredients for the manufacture of narcotics, but also that the crime was "conceived and contrived by government agents." *Id.* at 378. Quoting an earlier case, *Twigg* observed that "'when the government's own agent has set the accused up in illicit activity by supplying him with narcotics and then introducing him to another government agent as a prospective buyer, the role of government has passed the point of toleration.'" *Id.* at 379 (quoting *United States v. West*, 511 F.2d 1083, 1085 (3d Cir. 1975)). Summing up its analysis, the court observed that

> the DEA agents deceptively implanted the criminal design in [defendant Neville's] mind. They set him up, encouraged him, provided him the essential supplies and technical expertise, and when he and [a cooperating witness] encountered difficulties in consummating the crime, they assisted in finding solutions. This egregious conduct on the part of government agents generated new

> crimes by the defendant merely for the sake of pressing criminal charges against him when, as far as the record reveals, he was lawfully and peacefully minding his own affairs.

Id. at 381.[7]

A second post-*Hampton* court of appeals decision--*United States v. Tobias*, 662 F.2d 381 (5th Cir. Unit B 1981)--similarly constrained government crime creation as an investigative technique. *Tobias* purported to "set the outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit." *Id.* at 387. In *Tobias*, the DEA established a sham chemical supply company and advertised in High Times magazine. Tobias contacted the company and ordered supplies. He later canceled his order because (he told an undercover DEA agent) he had discovered that manufacturing cocaine was harder than he had thought. The agent suggested that Tobias try manufacturing PCP. Tobias agreed and ordered the necessary supplies. He was later prosecuted for

[7] This case resembles *Twigg* in several respects. Agent Osa "conceived and contrived" the scheme involving Colvin. He "set [Ms. Crase] up in illicit activity" by "introducing [her] to another government agent [Pankoke, posing as Colvin] as a prospective [client]." Agent Osa "encouraged" Ms. Crase to engage in unlawful activity--by, for example, urging her repeatedly to give him 30% of Colvin's money without disclosing the payment to Colvin--and did everything he could to "generate[] new crimes by [Ms. Crase] merely for the sake of pressing criminal charges against [her] when, as far as the record reveals, [she] was lawfully and peacefully minding [her] own affairs." 588 F.2d at 379, 381. Ms. Crase, unlike Twigg, ultimately rejected the government's efforts to draw her into criminal activity.

conspiracy to manufacture and possess PCP with intent to distribute. *See id.* at 383-84.

The court of appeals declined to find a due process violation because, it noted, Tobias and his wife initiated each of the contacts with the DEA undercover agents. *See id.* at 387. Thus, instead of being a "predisposed inactive participant" in the PDP scheme, Tobias was a "predisposed active participant, motivated solely by a desire to make money. It is this predisposition plus active and insistent participation that sets this case apart" from cases in which a due process violation was found. *Id.* The court of appeals observed pointedly that "[t]his would be a more difficult case if the DEA had pursued Tobias by repeated phone calls and encouragement." *Id.*[8]

The Eighth Circuit performed a similar analysis in *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984). An undercover agent and an informant

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[8] This case has precisely the elements of government overreaching that the court of appeals found lacking in *Tobias*. Ms. Crase was not predisposed at all when she encountered Agent Osa in May 2003, much less actively so. Indeed, Agent Osa's first ruse (from April or May 2003 to February 2004) did not produce any unlawful conduct. Unlike Tobias, Ms. Crase did not initiate contact with Agent Osa; on almost every occasion he contacted her. And, unlike the DEA agents in *Tobias*, Agent Osa "pursued [Ms. Crase] by repeated phone calls and encouragement." *Tobias*, 662 F.2d at 387. By his own admission, Agent Osa made the "vast majority of the calls in this case," and Ms. Crase "did not call [him] back in connection with the vast majority of his messages." 3 T. 548. If *Tobias* "set[s] the outer limits to which the government may go in the quest to ferret out and prosecute crimes in this circuit," 662 F.2d at 387, this case certainly exceeds those limits. Oddly, the court of appeals panel below, although bound by *Tobias*, never cited that decision.

visited Lard to buy a shotgun. Lard declined to sell the shotgun but offered to sell a small detonator instead. The agent implored Lard to sell him a more powerful pipe bomb. Lard initially demurred but eventually relented and, several hours later, produced the bomb in exchange for $100. Lard was prosecuted for transferring, and conspiring to transfer, a destructive device. He asserted both an entrapment defense and a due process violation.

The Eighth Circuit reversed Lard's conviction. It noted that before meeting the undercover officer, Lard had no criminal record and no history of dealing in destructive devices. Lard did not raise the subject of the pipe bomb and initially resisted the undercover agent's suggestion that he sell such a device. The court found entrapment established, based on Lard's lack of predisposition to sell the pipe bomb and the agent's inducement. The court also concluded that "[the undercover agent's] over-involvement in conceiving and contriving the crimes here approached being 'so outrageous that due process principles should bar the government from invoking judicial processes to obtain a conviction.'" 734 F.2d at 1298 (quoting *Russell*, 411 U.S. at 411-32). The court concluded that "[w]hile law enforcement officials may use strategy, stealth, and even deception to catch the unwary criminal, they may not arbitrarily select an otherwise law abiding person, gain his confidence, and then proceed to beguile or lure him to commit a crime he would not have otherwise attempted. It is the government's

duty to prevent crime, not to instigate or create it." *Id.* at 1295.[9]

Despite the early promise of *Twigg*, *Tobias*, and *Lard*, the circuits which hold that the Due Process Clause establishes limits on government crime creation have retreated over the last twenty-five years. Since *Lard*, not a single court of appeals decision has found a due process violation and reversed a conviction where undercover federal agents have manufactured a crime for the purpose of prosecuting an otherwise innocent person.

II. THE COURT SHOULD GRANT THE WRIT TO END THE CIRCUIT SPLIT AND CLARIFY THE DUE PROCESS LIMITS ON GOVERNMENT CRIME CREATION.

The Court should grant the writ to end the entrenched circuit split between the Second, Sixth, Seventh, and D.C. Circuits--which hold that due process does not limit government crime creation--and the First, Third, Fourth, Fifth, Eighth, Ninth, Tenth, and Eleventh Circuits--which hold that due process *does* impose such limits. Resolution of the circuit split is particularly important because, despite the scarcity of dismissals, defendants

[9] Here, the government did precisely what the court of appeals found proscribed in *Lard*: Agent Osa arbitrarily selected Ms. Crase, an otherwise law abiding person; he gained her confidence; and then he hounded her into participating in the plan to convince Colvin to invest in Precision Explorations--conduct in which she would not otherwise have engaged. This case is even more egregious than *Lard* (and *Twigg* and *Tobias*) in that even after Ms. Crase told Agent Osa (as Firo) to return the investor's money, the undercover agent spent another week pressuring her to go through with the transaction.

regularly raise the due process argument in prosecutions that arise from undercover investigations. There is thus a pressing need for a uniform national standard placing outer limits on government crime creation.

The Court should adopt the view of five Justices in *Hampton*--and of the majority of circuits--that due process bars overzealous federal agents from manufacturing crimes for the purpose of prosecuting otherwise innocent persons, and it should give meaning to that principle by holding that it requires dismissal of the contrived charges against Ms. Crase. This Court has declared that "[w]hen the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to [her] own devices, likely would have never run afoul of the law, the courts should intervene." *Jacobson v. United States*, 503 U.S. 540, 553-54 (1992); *see Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting) ("The Government may set decoys to entrap criminals. But it may not provoke or create a crime and then punish the criminal, its creature."). That is exactly what happened here. Had Ms. Crase never encountered Agent Osa, she would never have run afoul of the law. The record contains no hint that she engaged in (or even contemplated) criminal conduct before Agent Osa trained his sights on her in May 2003 or after he moved on to other targets in July 2004. The Fifth Amendment Due Process Clause should protect an innocent citizen such as Ms. Crase, who has the misfortune to find herself targeted by a federal agent determined to

manufacture a crime with which to charge, convict, and imprison her.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-17222

D.C. Docket No. 07-80123-CR-KAM

UNITED STATES OF AMERICA,

Plaintiff Appellee,

versus

VIOLETTE GAIL ELDRIDGE,
PAUL D. KUHN,
KATHERINE CRASE,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(April 21, 2010)

Before CARNES, ANDERSON and STAHL,* Circuit Judges.

STAHL, Circuit Judge.

Defendants-appellants Violette Gail Eldridge, Paul D. Kuhn, and Katherine Crase were tried and

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* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371, and mail fraud,[1] in violation of 18 U.S.C. § 1341 and 18 U.S.C. § 2. On appeal, they primarily argue that the FBI investigation that resulted in their prosecution and conviction amounted to outrageous government conduct and that sufficient evidence does not support their convictions. Having carefully considered the record, we affirm on both issue as to all three appellants. We also affirm as to several subsidiary issues raised by the various appellants, including the district court's jury instructions, estimation of the amount of loss, and sentencing.

I. Background

We recite the facts of the case in the light most favorable to the government. *See United States v. Gray*, 367 F.3d 1263, 1266 n.3 (11th Cir. 2004). In 2003, the FBI began an undercover investigation upon receiving a tip from a cooperating witness that Eldridge was involved in fraudulent financial dealings. As part of the investigation, an FBI agent posed as a hedge fund manager named John Firo[2] and

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[1] Eldridge and Crase were convicted of six counts of mail fraud, while Kuhn was convicted of one count of mail fraud and acquitted on the remaining five counts. Eldridge and Crase were sentenced to 30 months' imprisonment while Kuhn received a 24-month sentence.

[2] This opinion will refer to the FBI agents using their aliases.

met with Eldridge and Crase several times during 2003, proposing to create fraudulent hedge fund statements for a financial entity that the two women were in the process of creating. They declined involvement in the scheme.

In February 2004, Firo again approached Eldridge and Crase, telling them he was advising a potential investor who was seeking to invest $750,000 with a financial entity that would enable him to avoid paying taxes on the investment amount. This supposed wealthy investor was in fact another FBI agent using the alias Grant Colvin. Firo told Eldridge and Crase that in return for delivering the investor, he expected to receive a kickback payment out of the money invested by Colvin. Crase replied that such a payment would not be a problem, whether or not the investor knew about the arrangement.

Firo met with Crase the next month, in March 2004, to discuss Colvin's investment further; Eldridge participated in the discussion over the telephone. At the meeting, the kickback was discussed again, with Firo emphasizing that the potential investor could not know about the kickback; Eldridge and Crase assured him that the investor would not know of the arrangement. Eldridge and Crase also told Firo that they would prepare a private placement package for the investor that would promise a minimum annual

return of ten percent.[3] Later that same month, Firo confirmed in a phone call with Crase that his kick-back would amount to 30 percent of Colvin's initial investment.

Also in March, Firo told Eldridge and Crase that his investor, Colvin, was ready to meet with them to discuss the potential deal. Crase decided to bring in a third person, Paul D. Kuhn, to pitch the investment to Colvin in exchange for a financial payment of some sort. For the pitch meeting, Kuhn secured the use of the office of a Florida state representative with whom he had a personal relationship. As it turned out, that use was not authorized by the representative.

On April 13, 2004, Firo, Crase, and Kuhn held a planning meeting in order to rehearse for the pitch meeting, which was to be held the next day. During the planning meeting, Firo informed Kuhn that Colvin did not know that Firo stood to gain anything from the deal, and Kuhn agreed to conceal that fact from Colvin. Kuhn and Firo also rehearsed pretending to meet each other for the first time so that the investor would not know that Firo was involved

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[3] Eldridge and Crase also told Firo that the investor would not be informed of Eldridge's involvement in the investment entity because Eldridge was then the subject of an SEC action regarding other alleged financial misconduct. Indeed, though Eldridge apparently drafted the proposed investment agreement and was to have been primarily responsible for the financial management of the funds, her name did not appear on any documents given to the proposed investor, nor did she attend any meetings where the investor was present.

in the deal. Also, Crase and Kuhn rehearsed ways of pressuring Colvin to invest in the deal, including telling him that other investors had already been approached, that the offering was close to being sold out, and that Colvin might be the last one allowed in on the deal.

At the pitch meeting the following day, Kuhn explained to the potential investor that his political connections allowed the investment team to get in on business opportunities before the general public knew of them. He also explained that the investment would guarantee a ten percent annual return and would be "under the radar," enabling Colvin to avoid paying taxes on his investment amount. Crase told Colvin that the investment would be limited to thirty offers and twenty-five investors and that he was the seventeenth. In reality the investment had apparently only been offered to Colvin and there were never any other investors, real or imagined. Crase also implied that many of her past and current clients had already signed up for the investment. Kuhn confirmed to Colvin that he wasn't "the only guy" involved in the investment and made various other statements regarding other supposed investors. Also, Colvin asked Crase whether Firo had requested a commission and she replied in the negative.

After the meeting, the parties exchanged various documents and signed agreements through the mail, including documents intended to facilitate the payment of the kickback to Firo without running afoul of conflict of interest rules or revealing the kickback to

the investor. Ultimately, Crase decided not to go forward with the investment entity, no money changed hands, and Crase never executed the agreement.

The government indicted the three defendants for conspiracy to commit mail fraud as well as numerous counts of substantive mail fraud. The government's theory at trial was that the three defendants conspired to fraudulently gain access to Colvin's money by making materially false representations and omissions about the investment opportunity.

II. Discussion

The appellants jointly and, in some cases singularly, present numerous issues on appeal, none of which ultimately need detain us long. We address each in turn below.

1. Outrageous Government Conduct

Appellant Crase[4] moved before trial to dismiss the indictment against her for outrageous government conduct. The district court denied the motion.

We review de novo the district court's denial of a motion to dismiss an indictment on outrageous

[4] Though below Eldridge did not make a motion to dismiss based on outrageous government conduct, on appeal Eldridge adopts Crase's argument on this point.

conduct grounds. *See United States v. Edenfield*, 995 F.2d 197, 200 (11th Cir. 1993). On appeal, Crase posits that she was neither predisposed to engage in criminal conduct nor an active participant in the mail fraud conspiracy. Rather, she argues, the FBI agents hounded her, attempting unsuccessfully to lure her into numerous illegal schemes.

However, Crase's actions suggest otherwise. The undercover agents presented Crase with an opportunity to pitch an investment to a fake investor. Crase took that opportunity by, among other things, creating an investment scheme apparently intended solely for this one investor, organizing the pitch (including bringing Kuhn into the deal under the false pretense that he would be in charge of seeking out investment opportunities), making numerous false statements to the investor in order to induce his investment, and agreeing to provide and conceal a kickback to Firo. A review of the transcripts of the planning meeting and the pitch meeting, in particular, convince us that Crase was far from an innocent victim of a government attempt to dupe her into criminal activity. *See United States v. Ciszkowski*, 492 F.3d 1264, 1270 (11th Cir. 2007) ("Outrageous government conduct occurs when law enforcement obtains a conviction for conduct beyond the defendant's predisposition by employing methods that fail to comport with due process guarantees. Under this standard, the conduct must be so outrageous that it is fundamentally unfair.") (internal

citation omitted). We therefore affirm the district court's denial of Crase's motion.[5]

2. Sufficiency of the Evidence

All three appellants contest the sufficiency of the evidence on the counts for which they were convicted. We review a sufficiency claim de novo, viewing the evidence "in the light most favorable to the government with all reasonable inferences and credibility choices made in favor of the government." *United States v. Campa*, 529 F.3d 980, 992 (11th Cir. 2008), *cert. denied*, 129 S. Ct. 2790 (2009). We are tasked with concluding whether a reasonable jury could have concluded beyond a reasonable doubt that the defendants were guilty of the crimes charged. *United States v. Lopez-Ramirez*, 68 F.3d 438, 440 (11th Cir. 1995).

Having reviewed the record carefully, we affirm the district court's denial of the defendants' post-judgment motions for acquittal. As a preliminary matter, we reject the argument that acquittal was required because the defendants allegedly did not intend to abscond with Colvin's investment but rather intended to create a legitimate investment vehicle that would provide healthy returns to the investor. The record is replete with evidence that a reasonable jury could have construed to support the

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[5] We would also reject Eldridge's unpreserved argument on the same ground if it were properly before us.

conclusion that the coconspirators' aim was not to create a legitimate investment vehicle but to secure access for personal gain to the large sum of money that Colvin was reportedly interested in investing with them. Particularly given our standard of review, this argument is a non-starter.

Second, the defendants face an extraordinarily high burden in seeking to overturn the verdicts in this case. In order to sustain the convictions on the substantive mail fraud counts, we need only determine that a reasonable jury could have concluded that the defendants used the United States mail system to attempt to carry out a financial scheme involving materially false representations intended to defraud Colvin. *See United States v. Svete*, 556 F.3d 1157, 1161-62 (11th Cir. 2009); *United States v. Ellington*, 348 F.3d 984, 990 (11th Cir. 2003). Further, to sustain the conspiracy charge, we need only find that there was enough evidence for a jury to conclude that there was an agreement to devise a mail fraud scheme, that the defendants knowingly participated in the conspiracy, and that they committed one overt act in furtherance thereof. *See United States v. Suba*, 132 F.3d 662, 672 (11th Cir. 1998). Finally, the defendants in this case must reckon with an extensive record that contains numerous detailed and suggestive transcripts of the meetings and conversations that took place among the defendants and the undercover agents.

Having reviewed those transcripts carefully, we agree with the district court that the evidence was

sufficient to support the guilty verdicts as to each defendant. Reading the transcripts in the light most favorable to the verdicts, we easily conclude that a reasonable jury could have determined that defendants Eldridge and Crase made numerous materially false statements intended to fraudulently induce Colvin's investment. A reasonable jury could have read Eldridge's recorded conversations from March 15, 2004 and April 14, 2004, as persuasive evidence that she intended to pressure Colvin into an investment that she knew to be fraudulent. Similarly, Crase's statements at the planning meeting and the pitch meeting were also inculpatory and a reasonable jury could have viewed those statements as indicating unscrupulous financial behavior aimed at using false statements to convince Colvin to invest in a fraudulent investment vehicle.

The evidence against Kuhn is also sufficient to sustain the jury's verdict. While he argued to this court that he was merely the pitchman, brought in for two days to make the pitch, and was otherwise ignorant of the details of the deal, his recorded statements from the planning meeting and the pitch meeting belie that argument. The transcript of the planning meeting reveals that a reasonable jury could have concluded that he had prior knowledge of the fraudulent nature of the deal and that he intended to make material misrepresentations to Colvin at the pitch meeting in order to induce his investment. His behavior the following day at the pitch meeting provided further evidence for a reasonable jury to

render a guilty verdict. At the pitch meeting, he did not engage in mere puffing and seller's talk, as alleged, but made materially false representations about the nature of the deal that were intended to induce Colvin's investment.

We therefore affirm as to the sufficiency claims presented by all three defendants.

3. Jury Instructions

Crase[6] raises on appeal an argument regarding the jury instructions which was not preserved below. We therefore review the matter for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Monroe*, 353 F.3d 1346, 1349 (11th Cir. 2003) (plain error requires a showing of error that is plain and that affects defendant's substantial rights). Essentially, Crase argues that the jury instruction as to fraudulent omissions was incomplete because it did not state that such omissions constitute fraud only where there is a duty to disclose. She argues that because she allegedly did not have a duty to disclose, her failures to disclose could not have constituted fraudulent omissions. However, we conclude that we need not determine whether a duty to disclose instruction was required because a fair reading of the record reveals numerous instances of fraudulent misrepresentations by Crase, as well as by her co-defendants. The

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[6] Eldridge and Kuhn adopt Crase's jury instruction argument.

affirmative misrepresentations alone are sufficient grounds upon which to rest the guilty verdicts and we thus discern no plain error in the jury instructions that would have affected defendants' substantial rights.

4. Loss Amount

The district court calculated the loss amount to be $225,000, which was equivalent to the 30 percent kickback promised to the undercover agent (in other words, 30 percent of the proposed investment total of $750,000). At sentencing, the government argued that defendants should be held responsible for the total proposed investment amount ($750,000) while the defendants argued for a loss amount of zero because the defendants never accepted any money from the agents. On appeal, Eldridge[7] argues that the loss amount should have been zero because no money changed hands, or, in the alternative, 30 percent of $100,000 because the purported investor eventually proposed transferring a preliminary sum of $100,000 to the defendants.

We review a district court's determination of the amount of loss under the Sentencing Guidelines for clear error. *See United States v. Grant*, 431 F.3d 760, 762 (11th Cir. 2005). We find no such error here. The district court was quite reasonable in choosing an

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[7] Kuhn adopts Eldridge's argument on loss amount.

intermediate intended loss amount given that the record supported the conclusion that there was an agreement for a 30 percent kickback and that the defendants anticipated receiving $750,000 from the investor. *See United States v. Lee*, 427 F.3d 881, 893 (11th Cir. 2005) ("A sentencing court need only make a reasonable estimate of the loss, given the available information.").

5. Sentencing

On appeal, Eldridge alone contests the length of her sentence. She argues that the district court's sentence of 30 months in prison was substantively unreasonable due to erroneous consideration of the sentencing factors under 18 U.S.C. § 3553(a). She contends that the court did not adequately consider the alleged outrageous conduct of the government, along with her age and health,[8] and that "the district court should have given greater consideration to a sentence which did not include imprisonment, or that was below the advisory guideline range."

We review the sentence only for reasonableness, *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005), and note that the district court sentenced Eldridge at the low end of the advisory guideline range of 30 to 37 months. We do not find Eldridge's

[8] Eldridge, who is 65-years-old, asserts that she suffers from asthma, heart murmurs, diabetes, diverticulitis, sleep apnea, and chronic kidney infection.

30-month sentence to be unreasonable, particularly given that the district court explicitly considered Eldridge's age and that we have already concluded that the outrageous government conduct argument is meritless.

III. Conclusion

For the forgoing reasons we ***affirm*** as to all issues raised on appeal by all defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 07-80123-CR-MARRA

UNITED STATES OF AMERICA,

v.

VIOLETTE GAIL ELDRIDGE,
KATHERINE CRASE AND
PAUL D. KUHN,

DEFENDANTS. /

ORDER DENYING DEFENDANT'S MOTION TO DISMISS INDICTMENT, MOTION FOR ADDITIONAL DISCOVERY AND MOTION FOR HEARING ON MOTION TO DISMISS

These matters came before the Court on Defendant Katherine Crase's Motion to Dismiss Indictment [DE 91], Defendant's Motion for Additional Discovery [DE 90] and Defendant's Motion for Hearing on Motion to Dismiss [DE 150]. Upon considering the motions and otherwise being duly advised in the premises, it is hereby ordered and adjudged that Defendant's Motion to Dismiss Indictment, Defendant's Motion for Additional Discovery and Defendant's Motion for Hearing on Motion to Dismiss are **DENIED.**

Done and ordered in Chambers, in West Palm Beach, Florida, this 11th day of December, 2008.

/s/ [Illegible]
KENNETH A. MARRA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-17222-CC

UNITED STATES OF AMERICA,

Plaintiff Appellee,

versus

VIOLETTE GAIL ELDRIDGE,
PAUL D. KUHN,
KATHERINE CRASE,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Jun. 16, 2010)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: CARNES, ANDERSON and STAHL, *Circuit Judges.

PER CURIAM:

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* Honorable Norman H. Stahl, United States Circuit Judge for the First Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE